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No. 745

In the Supreme Court of the United States

OCTOBER TERM, 1935

PREMIER-PABST SALES COMPANY, A CORPORATION OF THE STATE OF DELAWARE, COMPLAINANT

v.

WALTER T. GROSSCUP, W. WORRELL WAGNER AND LEO A. CROSSEN, constituting the PENNSYLVANIA LIQUOR CONTROL BOARD; CHARLES F. KELLEY, District Attorney of Philadelphia County, Pennsylvania; WILL B. HADLEY, County Treasurer of Philadelphia County, Pennsylvania; CHARLES J. MARGIOTTI, Attorney General of the Commonwealth of Pennsylvania; and GEORGE H. EARLE 3d, Governor of the Commonwealth of Pennsylvania,

Defendants

BRIEF FOR APPELLEES

WALTER T. GROSSCUP, W. WORRELL WAGNER and LEO A. CROSSEN, constituting the PENNSYLVANIA LIQUOR CONTROL BOARD; CHARLES J. MARGIOTTI, Attorney General of the Commonwealth of Pennsylvania; and GEORGE H. EARLE, 3rd Governor of the Commonwealth of Pennsylvania.

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Defendants

BRIEF FOR APPELLEES

RESTATEMENT OF FACTS

This matter comes before the Court on appeal by The Premier-Pabst Sales Company, a corporation of the State of Delaware, from the decree of a three-judge Court dismissing the appellant's Bill of Complaint, praying for a declaratory judgment and an injunction restraining the appellees from enforcing certain provisions of an act of assembly of the Commonwealth of Pennsylvania approved July 18, 1935, P. L. 1217 (Act No. 398), known as the "Beverage License Law," on the ground that the said provisions are unconstitutional. The decree of the Court sustained the constitutionality of the act.

The Bill of Complaint assigns certain provisions of the said Beverage License Law, enacted to regulate

and restrain the traffic in malt and brewed beverages and which re-enacts and amends the Act of the Commonwealth of Pennsylvania approved May 3, 1933, P. L. 252, as amended by the Act of December 20, 1933 (Special Session 1933-34), P. L. 75, as in contravention to the Commerce Clause (section 8, of article I), the Fourteenth Amendment, and the Privileges and Immunities Clause (section 2 of Article IV) of the Constitution of the United States.

More specifically and particularly, the Bill of Complaint attacks the following provisions of said Act:

> Section 18 of the Act requires distributors to file a bond in the penal sum of one thousand dollars; importing distributors are required to file a bond in the penal sum of two thousand dollars; bonds executed to the Commonwealth.
>
> Section 19 of the Act requires a distributor to pay an annual license fee of four hundred dollars; importing distributors are required to pay an annual license fee of nine hundred dollars; fees payable to the Liquor Control Board to be transmitted to the State Treasury and paid into The State Stores Fund.
>
> Section 5 (b) of the Act provides that licenses shall be issued to corporations duly organized or registered under the laws of Pennsylvania only when it appears that all of the officers and directors thereof are citizens of the United States and have been residents of Pennsylvania for a period of at least two years prior to the date of application, and at least fifty-one percent of the capital stock of such corporations is actually owned by individuals who are citizens of the United States and have been residents of Pennsyl-

vania for a period of at least two years prior to the date of application.

Distributors are defined by Section 2 (d) of the Act as purchasers from Pennsylvania manufacturers and from importing distributors, but are restricted in sales to retail dispensers and consumers only.

Importing distributors are defined by section 2 (e) of the Act as purchasers from manufacturers and other persons located outside of the Commonwealth and from persons licensed as manufacturers and distributors under the Act, but are not restricted in sales to retail dispensers and consumers; they may sell also to other distributors and other importing distributors, a privilege denied to mere distributors.

The Liquor Control Board is authorized to license distributors and importing distributors to engage in the purchase and resale of malt or brewed beverages in the original packages as prepared for the market by manufacturers but not for consumption on the premises where sold.

Regulation No. 51 of the Liquor Control Board, issued July 25, 1935, rules that holders of Malt Liquor Distributors Licenses file applications with the Board for Malt or Brewed Beverage Distributors' or Importing Distributors' Licenses not later than August 10, 1935, and allows credit for the unused portion of the fee paid to the County Treasurer under the former Act of which the present legislation is an amendment. The Act provides fines and penalties for violation thereof and of the rules and regulations of said Board.

The Premier-Pabst Sales Company is a corporation of the State of Delaware, duly registered as a foreign corporation under the laws of the State of Pennsylvania wherein it maintains a place of business at 1601 Chestnut Street, Philadelphia and is there engaged as a distributor of malt or brewed beverages imported by it into Pennsylvania.

The appellant is a subsidiary of the Premier-Pabst Corporation, a corporation of the State of Delaware. The parent corporation is not registered as a foreign corporation in Pennsylvania, but is engaged in the manufacture of malt or brewed beverages at Milwaukee, Wisconsin, and Peoria, Illinois. The officers and directors of the appellant are not and have not been residents of the State of Pennsylvania, and all of its capital stock is owned by the said Premier-Pabst Corporation.

The appellant, at the time of and for some time prior to the filing of its Bill of Complaint in the instant case, was the holder of a Pennsylvania beer distributor's license issued by the Treasurer of Philadelphia County, under the provisions of the Act of the General Assembly of Pennsylvania, approved the 20th day of December 1933 (Special Session 1933-34), P. L. 75, known as the "Malt Liquor License Law." It has not applied for nor received the license required by the Beverage License Law in question

SUMMARY OF THE ARGUMENT

I. The appellant's right to maintain this action is predicated upon its averment that it possesses a valid distributor's license.

II. The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States which the States are forbidden to abridge.

III. State prohibition or restriction of the manufacture, sale and use of intoxicating liquors within its limits and diminution in the value of private property resulting therefrom is consistent with and is not deprivation without due process of law.

IV. The classification of a distributor and an importing distributor prescribed by the statute in question is neither discriminatory nor unreasonable.

V. The efficacy of State regulation and restraint of traffic in intoxicating liquors is guaranteed by the Twenty-first Amendment to the Constitution of the United States, without qualification by the law of interstate commerce.

VI. The statute in question was enacted in the exercise of the police power of the State to regulate and restrain the traffic in malt and brewed beverages. All of its provisions are reasonable and germane to the subject expressed in the title, and essential to properly control said traffic.

VII. Effect of severability clause of the statute.

ARGUMENT

I.

The Appellant's Right to Maintain this Action is Predicated upon Its Averment That It Possesses a Valid Distributor's License.

The appellant's substantial interest is based upon a valid beer distributor's license issued to it under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania approved the third day of May, 1933, P. L. 252, as amended. It avers in paragraph six of the Bill of Complaint (R. 7) that it is a foreign corporation, registered to transact business in Pennsylvania and that all of its officers and directors are non-residents of Pennsylvania. Under the provisions of the said Act of Assembly, the Treasurer of Philadelphia County who issued the said license, and the appellant, the recipient thereof, issued and received respectively said license in violation of said Act, which specifically provides that no such license shall be issued to any corporation unless all the officers and directors thereof have been residents of the Commonwealth of Pennsylvania for a period of three years prior to application.

It seems to the appellees, that the argument of the appellant (Appellant's Brief, Pages 54-55) which would lead to an impression that at the time it secured from the Treasurer of the County of Philadelphia the license which it holds under the Act of May 3, 1933, P. L. 252, as amended, all its officers and directors were residents of Pennsylvania, is an imposition upon this Court. We believe that counsel in appearing be-

fore this Court owe a duty to disclose to the Court the true state of facts upon which their case is based and not to seek by half truths to mislead the Court into believing that the officers and directors of the appellant were residents of Pennsylvania at the time of its license application. We now assert that at the time appellant secured its license from the County Treasurer of Philadelphia County its officers and directors were all non-residents of Pennsylvania and that such information was contained in the application, verified under oath, upon which its license was issued.

The said license, having been issued in violation of an expressed legislative prohibition, was invalid and void ab initio. The action of the County Treasurer in issuing the said license was ultra vires: the acceptance of the license by the appellant was knowingly illegal, by reason whereof the appellant has been and is now engaged in business in Pennsylvania as a distributor of beer in violation of its laws, and therefore has no right to maintain this action.

When the law of a state requires as a condition precedent a license to engage in the liquor or beer business, a void license held by a person or a corporation confers no privilege upon, neither does it afford any protection to, the holder of such license.

A person is not protected from criminal prosecution by a license or permit which is void on its face as from an evident want of authority to issue.

COM. *v.* MCCORMICK, 150 Mass. 270, 22 N. E. 911.

Or where it is affirmatively shown to have been issued without compliance with the statutory requisites.

COM. *v.* ED. D. SCHWEM CO., 69 Pa. Super. 159,

U. S. *v.* MASTERS, 267 Fed. 581.

The rule that a license, regular on its face, cannot be collaterally attacked, as in an action on the bond, or in a prosecution for illegal sales, applies to cases of irregularity merely, and not where the license is issued in violation of an express legislative prohibition, as in the case of issuance to a corporation when forbidden by statute.

15 R. C. L., sec. 41, p, 287.

The wholly void action of the licensing authorities in issuing the license may be collaterally impeached.

ALLEN *v.* STATE, 181 Ala. 383, 61 S. 912.

The appellant's possession of a void license and its operation thereunder do not constitute such an interest in the subject matter as to entitle it to the relief for which it prays, or to maintain this action

Furthermore, the Pennsylvania Beverage License Law of 1935 contains a similar prohibition against the issuance of a license to non-residents, but reduces the requirement for residence in the State of officers and directors of a corporation to a period of two years prior to the application for license, and requires that fifty-one percent of the stockholders of such corporation shall have been residents of the State for a like period of two years prior to application.

The appellant, by reason of its averment that all of its officers and directors are non-residents of the Com-

monwealth of Pennsylvania, and that all of its stock is owned by the Premier-Pabst Corporation, a corporation of the State of Delaware and engaged in the manufacture of beer in Milwaukee, Wisconsin, and Peoria, Illinois, could not qualify for a license of any kind under the provisions of the Beverage License Law of 1935, or of the Act to which the said Act is an amendment.

The ownership of the appellant's stock by a manufacturer of malt or brewed beverages also violates section 28 (a) of the Malt Liquor License Law, under the provisions of which Act it holds its license. This section prohibits a manufacturer or an officer or director of any manufacturer from being at the same time, a distributor or retailer, or an officer, director or stockholder or creditor of any distributor or of any retailer, or the owner, proprietor or lessor of any place covered by any malt liquor distributor or malt liquor retail license.

The purpose of this provision, as stated in the Act, is to require a separation of the financial and business interests between the various classes of business regulated by the Act.

The term "manufacturer" as used in the said section, includes manufacturers of malt liquor within and outside the Commonwealth of Pennsylvania.

The appellant has not only willfully violated the provisions of the Act under which it applied for and accepted its beer distributor's license, but has contin-

ued in such violation, and by its action, has also violated the maxim of equity: "He who comes into equity must come with clean hands." For these reasons, it should not be permitted to maintain this action.

II.

The Right to Sell Intoxicating Liquors is Not One of the Privileges and Immunities of Citizens of the United States which the States are Forbidden to Abridge.

Liquor or beer license laws are for the protection of the community, and not for the benefit of persons engaged in the alcoholic beverage business. Their object is to restrain the traffic to the few and not to open it to all without restraint.

The right to engage in the sale of intoxicating liquors is not one of the privileges or immunities of citizens of the United States which the states are thereby forbidden to abridge, nor can such restrictive statutes be said to deprive persons of liberty or property without due process of law, nor, if not entirely arbitrary in their discrimination between persons, do they deprive anyone of the equal protection of the laws.

PHILLIPS *v.* MOBILE, 208 U. S. 472.

The validity of the exercise by a State of its police power in regulating the sale of intoxicating liquors does not in the least depend on any question as to the presence or absence of discrimination for or against particular persons or classes of persons.

The legislature may lawfully grant the right to sell to a certain class or classes of persons and withhold it from all others, and no citizen of the United States can complain because state police regulations deny him the privilege of selling intoxicating liquors, even when the privilege is accorded other citizens.

9 L. A. R., p. 780, and notes.

So long as a license law affects all persons in a state engaged in the sale of intoxicating liquor in exactly the same manner, it is not objectionable under the Federal constitution as arbitrarily taking property, or denying the equal protection of the laws

It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States.

GIOZZA *v.* TIERNAN, 148 U. S. 657 (1893).

It is competent for a State legislature to require that no license shall be issued to any person to sell liquor unless he be a resident of the State.

METTE *v.* MCGUCKIN, 18 Neb. 324 (1885), affirmed in 149 U. S. 781 (1892), without written opinion.

And a state statute requiring a residence for two years in the county wherein a license to sell intoxicat-

ing liquors is sought does not abridge the privileges and immunities clause.

DEGRAZIER *v.* STEPHENS, 101 Tex. 194 (1907).

The requirement of licenses is within the limits of what may constitutionally be done. Whether the public good requires the sale of intoxicating liquors is a matter for the legislature.

CROWLEY *v.* CHRISTENSEN, 137 U. S. 86.

MILLER *v.* AMMON, 147 U. S. 421.

A license for the sale of liquor is not a contract between a state or municipality granting it, and the person to whom it is issued, in any such sense as to be within the protection of constitutional guarantees.

BOSTON BEER CO. *v.* MASS., 97 U. S, 25

KESSER *v.* LYMAN, 74 Fed. 765

MORAN *v.* GOODWIN, 130 Mass. 158.

A permit (license) is in no sense a contract.

MILLSTONE *v.* YELLOWLEY, 290 Fed. 855.

It gives no vested rights such as cannot be abridged or abrogated by the legislative authority in the interest of the public.

COM. *v.* JAMES SELLERS, 130 Pa. 32

MILLSTONE *v.* YELLOWLEY, 290 Fed. 855.

PEOPLE *v.* SISSON, 220 N. Y. 387, affirmed in 180 App. Div. 464, 167 N. Y. S. 801.

Nor is it itself property or a right of property in the ordinary meaning of those terms.

KRESSER *v.* LYMAN, 74 Fed. 765.

A license to engage in the purchase and resale of malt or brewed beverages, therefore, is merely a privilege subject to the control and regulation of the State. It is submitted that the law is properly stated by the lower court in its opinion under the heading "Due Process and Equal Protection," where is says, inter alia, (R. 103, 104):

> "The traffic in intoxicating liquor is universally known to be loaded with danger to the public weal. It may be subjected to the most stringent regulation. Licenses to sell to the ultimate consumer may be limited to those who in the conduct of the business can be brought under control and supervision. The traffic is one emphatically 'fraught with a public interest'. No one can claim 'the right and privilege' to do harm to others. The regulation of the traffic by state laws, in the attempt to minimize the evils attending it, is no infringement of the rights of anyone. It is no denial of any of 'the privileges and immunities' of citizens of the United States."

DEGRAZIER *v.* STEPHENS, 101 Tex. 194, 61 A. L. R., 337, and cases cited in notes.

That the effect of some of the regulations may be to favor domestic products or citizens of the State does not in itself render a state law obnoxious to the provisions of the Fourteenth Amendment.

COX *v.* TEXAS, 202 U. S. 446

BROWN-FORMAN *v.* COMMONWEALTH, 217 U. S. 563

WAREHOUSE *v.* TOBACCO GROWERS, 276 U. S. 71

AMERICAN SUGAR *v.* LOUISIANA, 179 U. S. 89.

Residence within the state of the officers and directors of a corporate licensee is absolutely necessary for efficient enforcement of the liquor laws. It is apparent that what the appellant desires is not equal privileges with domestic corporations of Pennsylvania, but superior privileges, as its admitted ownership by the Premier-Pabst Corporation, a beer manufacturer, is prohibited by both the Malt Liquor License Law, under which its license was issued, and by Section 28 (a) of the law in question (R-69).

If, therefore, the Beverage License Law of Pennsylvania expressly or by implication restricts the privileges of selling intoxicating liquors to persons domiciled in Pennsylvania, it is nevertheless valid and binding under the authorities cited. The manner, scope and extent of the traffic in malt or brewed beverages are the subjects of legislative inquiry and control. The purpose of the act in question is the protection of the public welfare, health, peace and morals of the people of the Commonwealth of Pennsylvania. The law operates equally on all persons within the classification defined in the act.

An examination of the Beverage License Law in question shows that all of its provisions are within the police power of the state. It is wholly domestic in purview and application, and relates only to persons and property within the state to which it applies. Nothing in its language warrants the inference that

it was intended to embrace persons or property beyond the jurisdiction of legislative power, while some of its provisions could be defeated by residence without the state. It is intended for the protection and welfare of the citizens of the Commonwealth of Pennsylvania, and its enforcement for this purpose can best be attained when those who may be amenable to its penalties are wholly under the surveillance of the enforcement officers of the state.

III.

State Prohibition or Restriction of the Manufacture, Sale and Use of Intoxicating Liquors within its Limits and Diminution in the Value of Private Property Resulting therefrom is Consistent with and is not Deprivation without Due Process of Law.

Such legislation rests upon the acknowledged right of a state to control purely internal affairs, and in doing so to protect the health, morals and safety of its people. This was recognized prior to the ratification of the Fourteenth Amendment, and since then has not been questioned by this Court.

BARTEMEYER *v.* IOWA, 18 Wall. 129 (1873)

MUGLER *v.* KANSAS, 123 U. S. 623 (1887)

KIDD *v.* PEARSON, 128 U. S. 1 (1888)

CROWLEY *v.* CHRISTENSEN, 137 U. S. 86 (1890)

GIOZZA *v.* TIERNAN, 148 U. S. 657 (1893)

The force of such laws is derived from power originally belonging to the states, preserved to them by

the Tenth Amendment, and was independent of National Prohibition.

VIGLIOTTI *v.* PENNSYLVANIA, 258 U. S. 403 (1922)

Mr. Justice Holmes, in sustaining a local option statute, declared in RIPPEY *v.* TEXAS, 193 U. S. 504, 509 (1904): "* * * The state has the power to prohibit the sale of intoxicating liquors altogether, if it sees fit, MUGLER *v.* KANSAS, 123 U. S. 623, and that being so it has the power to prohibit it conditionally."

Diminution in the value of property, resulting from prohibitory enactments, is not an appropriation in the sense of eminent domain; nor is destruction of property used in violation thereof and thereby maintained as a public nuisance a deprivation of such property without due process of law.

MUGLER *v.* KANSAS, 123 U. S. 623 (1887)

KIDD *v.* PEARSON, 128 U. S. 1 (1888)

See also EILENBECKER *v.* PLYMOUTH CO., 134 U. S. 31 (1890)

The same principle was adopted by the Court in denying that the use or disposition of property by Congress under the War Time Prohibition and National Prohibition Acts, resulting in hardship and loss to the owners thereof, was arbitrary and unreasonable.

HAMILTON *v.* KENTUCKY DISTILLERIES CO., 251 U. S. 146 (1919)

RUPPERT *v.* CAFFEY, 251 U. S. 264 (1920)

State prohibition may prohibit and punish possession of intoxicating liquors for personal use, in the course of due process of law.

CRANE *v.* CAMPBELL, 245 U. S. 304 (1917)

IV.

The Separate Classification of a Distributor and an Importing Distributor Prescribed by the Statute in Question is neither Discriminatory nor Unreasonable.

The proposition that reasonable classifications of persons and businesses is not a denial of equal protection under the Fourteenth Amendment is so fundamental that no attempt will be made to support it with authority. It is enough if there is no discrimination in favor of one as against another of the same class, and due process of law within the meaning of the Fourteenth Amendment is secured if the law operates on all alike and does not constitute an arbitrary exercise of state power.

The statute under construction actually confers greater privileges upon the importing distributor. The distributor is prohibited from importing beer and purchasing domestic beer from another distributor, but may purchase both imported and domestic beer from the importing distributor, who is unrestricted in the purchase of beer either foreign or domestic.

The distributor may not sell to another distributor, but sales by an importing distributor are unrestricted. This is a substantial difference. The distributor, un-

der the previous law, who was engaged in importing malt or brewed beverages, may continue to import such beverages provided he applies for and secures an importing distributor's license from the Pennsylvania Liquor Control Board and pays the increased fee therefor, less a credit for the unused portion of the fee paid for the previous license.

The appellant lays great stress upon the amount of the license fee required by the act to be paid by the importing distributor, and because this fee is larger than that required of a distributor, it contends the act discriminates in favor of domestic and against foreign beer.

The Beverage License Law applies to all persons in the State of Pennsylvania engaged in the sale of malt or brewed beverages in exactly the same manner, and the classification applies equally to those engaged in the sale of both domestic and foreign beer. The higher license fee required of the importing distributor is due to the greater privileges he enjoys under his license. The classification is natural and reasonable. The increased license fee for both distributor and importing distributor is only incidental to the main purpose of the act, viz: regulation and restraint of the traffic in malt and brewed beverages.

The license fee for each class of distributor is neither prohibitive nor discriminatory, but reasonable and proper for the privileges received.

In passing, it is interesting to note that a statute providing for a tax on sellers of liquors, but stipulat-

ing that it "shall not apply to wines produced from grapes grown in this state while in hands of producers or manufacturers thereof" was held not discriminatory in the absence of the fact of interstate commerce.

Cox *v.* Texas, 202 U. S. 446 (1906)

A recapitulation of all three preceding points of argument would be necessary to fix the standard of reasonableness applicable to the case at bar. In brief, it is submitted that since the enactment of the Webb-Kenyon Act and the ratification of the Tweny-First Amendment, the justification for a regulation and restriction of the traffic in intoxicating beverages under the Fourteenth Amendment will satisfy the standard without reference to the law of interstate commerce. Complainant has no recourse to the privileges and immunities clause on account of requirements of residence within the state, nor to the Fourteenth Amendment on account of hardship or loss. And the separate classification of a distributor and an importing distributor is neither a denial of equal protection nor of due process of law.

The statute in question is a police measure and like its progenitor, the Brooks High License Law Pennsylvania Act of May 13, 1887, P. L. 108, it was not written for the express or prime purpose of deriving revenue from licensing the sale and regulating the use of intoxicating beverages.

Like Congress under the Eighteenth Amendment, the states under the Twenty-First Amendment have far-reaching powers. By virtue of the Eighteenth

Amendment, Congress had successfully passed legislation which in terms exceeded the actual language of the amendment. The manufacture, sale and transportation of nonintoxicating beverages was prohibited: NATIONAL PROHIBITION CASES, 253 U. S. 350 (1920); local manufacture of denatured alcohol not intended for and unfit for beverage purposes was regulated: SALZMAN *v.* UNITED STATES, 268 U. S. 466 (1925); physicians were prevented from prescribing intoxicating malt liquors for their patients: EVERARDS' BREWERIES *v.* DAY, 265 U. S. 545, 560 (1924); and severely restricted in the prescription of spirits to their patients: LAMBERT *v.* YELLOWLEY, 272 U. S. 581, 593 (1926).

In the last two decisions cited, the Court referred to the settled rule that where the means adopted by Congress in exerting an express power are calculated to effect its purpose, it is not admissible for the judiciary to inquire into the degree of their necessity. And this Court, in considering a statute designed to protect game within the state, declared in SILZ *v.* HASTERBERG, 211 U. S. 31, 40 (1908):

> "* * * subject to constitutional limitations, the legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and, is itself the judge of the necessity or expediency of the means adopted."

V.

The Efficacy of State Regulation and Restraint of Traffic in Intoxicating Liquors is Guaranteed by the Twenty-First Amendment to the Constitution of the United States, without Qualification by the Law of Interstate Commerce.

Assuming, for the purposes of argument, the premise that there is here involved (1) commerce, (2) interstate in its nature, and (3) a regulation thereof in fact, a proper question is raised under the commerce clause of the Constitution, which normally imposes a special limitation on the power of the states. But the completeness of the divestment of the interstate character of intoxicating beverages under the Twenty-First Amendment to the Constitution of the United States may be demonstrated by an examination of the character of the regulation and the trend of the law regulating intoxicating liquors prior to the ratification thereof.

The Wilson Act. After the period of local self-government and state rights in the matter of the control of intoxicating liquors (LICENSE CASES, 5 How. 504 (1847)) had been cut short by decisions of this Court, (BOWMAN *v.* CHICAGO and N. W. RY. Co., 125 U. S. 465 (1888) and LEISY *v.* HARDIN, 135 U. S. 100 (1890)) Congress attempted to restore state control by the passage of the Wilson Act, August 8, 1890, c. 728, 26 Stat. 313, entitled "An act to limit the effect of the regulation of commerce between the several States and with foreign countries in certain cases,"[11] which provided:

> "That all fermented, distilled, or other intoxicating liquors or liquids transported into any

> State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been purchased in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Sustained in RE RAHRER, 140 U. S. 545 (1891).

But, due to the use in the Wilson Act of the words "upon arrival," this Court persistently postponed the effectiveness of state regulation until actual delivery to the consignee, that is, the right to receive liquor was unaffected, thereby giving effect to the law of interstate commerce in certain cases.

> RHODES *v.* IOWA, 170 U. S. 412 (1898)
>
> AMERICAN EXPRESS CO. *v.* IOWA, 196 U. S. 133 (1905)
>
> HEYMAN *v.* SOUTHERN RY. CO., 203 U. S. 270 (1906)
>
> ADAMS EXPRESS CO. *v.* KENTUCKY, 206 U. S. 129 (1907)
>
> LOUIS. AND NASH. R. R. *v.* COOK BREWING CO., 223 U. S. 70 (1912)
>
> KIRMEYER *v.* KANSAS, 236 U. S. 568 (1915)
>
> ROSENBERGER *v.* PACIFIC EXPRESS CO., 241 U. S. 48 (1916)

The Wilson Act gave a state no authority to restrict the power of importation to a state commission so as

to have the effect of discrimination against sales in interstate commerce negotiated directly by its citizens: SCOTT *v.* DONALD, 165 U. S. 58 (1897); and in this respect the Beverage License Law of the Commonwealth of Pennsylvania is not offensive. Further, under the Wilson Act, sales in interstate commerce negotiated directly by residents of the state, could not be subjected to conditions: VANCE *v.* VANDERCOOK CO., 170 U. S. 438 (1898), although the state law in this case, revamped after the former decision, was held not discriminative against interstate commerce simply because it gave to state authorities an exclusive right to purchase all liquor sold within the state so long as it did not attempt to restrict the direct interstate purchases of its citizens.

On the other hand, the power of the state attached before sale of intoxicating liquors, under the Wilson Act, thereby giving effect to non-discriminatory state license taxes for the privilege of the sale thereof or of engaging in the business of a dealer therein, even when applied to non-residents.

REYMANN BREWING CO. *v.* BRISTER, 179 U. S. 445 (1900)

FOPPIANO *v.* SPEED, 199 U. S. 501 (1905)

PHILLIPS *v.* MOBILE, 208 U. S. 472 (1908)

DEBARY *v.* LOUISIANA, 227 U. S. 108 (1913)

The Wilson Act was held to validate a state statute requiring a license for salesmen soliciting orders for sales of liquor shipped in interstate commerce, thereby giving precedence to the state regulation over

the usual limitations of the commerce clause, as clearly pointed out in the case of DELAMATER *v.* S. DAKOTA, 205 U. S. 93, 97-99 (1907), where the Court said:

> "The general power of the states to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question. * * * It is settled by a line of decisions of this Court. noted in the margin (at p. 98), that the purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the states, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the states over intoxicating liquor, by the Wilson Act adopted a special rule enabling the states to extend their authority as to such liquor shipped from other states before it became mingled with the mass of other property in the state by a sale in the original package. * * * (The Wilson Act) manifested the conviction of Congress that control by the states over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose the regulation expressly provided that intoxicating liquor coming into a state should be as completely under the control of a state as if the liquor had

been manufactured therein, it would be, we think, a disregard of the purpose of Congress to hold that the owner of intoxicating liquors in one state can by virtue of the commerce clause go himself or send his agent into such other state, there in defiance of the law of the state, to carry on the business of soliciting proposals for the purchase of intoxicating liquors."

This case is noteworthy and expressly concedes a different treatment of the traffic in intoxicating beverages. Mr. Justice White definitely refused to consider decisions which concerned only the power of a state to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson Act.

Also under the Wilson Act, a state inspection law was held to be valid, even though the inspection fee was out of proportion (by 30 times) to the cost of inspection and the inspection itself was inadequate as a protection against fraud or impurity. Further, the Supreme Court held immaterial the fact that the operation of the state law was or might be such as to deter importations into the state. And finally, the Court refused to review the determination of the state court that the statute was not a revenue but a police measure.

PABST BREWING CO. *v.* CRENSHAW, 198 U. S. 17, 26 (1905)

"Conceding that the law in question may be inadequate to accomplish the purpose designed and produces a large revenue to the state over and

above the cost of inspection, this affords no Federal ground upon which to hold that the police power of the state was not brought into play in making the enactment where the law does not operate upon a subject within the Federal control. This becomes evident when it is borne in mind that, whether the statute be regarded as a prohibition, as a regulation, as a license, or as an inspection law, if it encroached upon the Federal authority it would be void, and, on the contrary, in all or any of these aspects the law would be valid, so far as the Federal Constitution is concerned, if it did not so encroach. The purpose of the Wilson Act was to make liquor after its arrival a domestic product and to confer power upon the states to deal with it accordingly. The police power is hence to be measured by the right of a state to control or regulate domestic products, a state and not a Federal question as respects the commerce clause of the Constitution. So far as the state aspect is concerned, the matter is foreclosed by a decision of the Supreme Court of Missouri passing upon the validity, under the state constitution of the law now under consideration."

The results in this case are significant in view of the general contemporary doctrines, urged upon the Court, (1) that interstate commerce is unconstitutionally burdened by a state tax, termed an inspection charge, resulting in receipts largely in excess of the amount required to pay the cost of inspection, and (2) that the Supreme Court will not hold itself bound by the definition of the tax as declared by the state,

but will be guided by its practical operation and effect as applied and enforced. The latter principle has no application to the traffic in intoxicating beverages:

PABST BREWING CO. *v.* CRENSHAW, 198 U. S. 17 (1905), followed in DELAMATER *v.* S. DAKOTA, 205 U. S. 93 (1907)

Finally, under the Wilson Act, there is a suggestion in the decisions that the states could not discriminate against interstate shipments of intoxicating liquors. The warning is confined to dicta.

SCOTT *v.* DONALD, 165 U. S. 58, 100 (1897)

REYMANN BREWING CO. *v.* BRISTER, 179 U. S. 445 (1900)

PHILLIPS *v.* MOBILE, 208 U. S. 472, 480 (1908)

But before the passage of the Wilson Act, there was a clear cut case forbidding discrimination:

WALLING *v.* MICHIGAN, 116 U. S. 446 (1888)

It is submitted, however, that none of these cases deserves recognition as controlling authority for the simple reason that state regulation did not attach before delivery to the consignee, under the Wilson Act, by the very terms of which there always remained a zone of protection under the commerce clause.

The Webb-Kenyon Act. In the face of an adverse opinion by the Attorney General and over President Taft's veto, Congress passed the Webb-Kenyon Act, March 1, 1913, c. 90, 37 Stat. 699, entitled "An act divesting intoxicating liquors of their interstate character in certain cases," which provided:

"That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited." Sustained,

CLARK DISTILLING CO. *v.* WESTERN MD. RY. CO., 242 U. S. 311 (1917)

The act was an extension of the Wilson Act and the purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus by subterfuge and indirection to set such laws at naught: ID.

Before the assaults of the liquor interests were circumscribed by the interim of national prohibition,

Congress had further enacted the so-called "Reed Amendment," March 3, 1917, c. 162, 39 Stat. 1058, 1069, making punishable the order, purchase or transportation of liquor in interstate commerce except for certain purposes, into any State or Territory in which the manufacture or sale thereof was prohibited. Sustained,

UNITED STATES *v.* HILL, 248 U. S. 420 (1919)

WILLIAMS *v.* UNITED STATES, 255 U. S. 336 (1921).

And C. O. D. transactions in violation of state and Federal regulations were made punishable under the Criminal Code of the United States, c. 321, 35 Stat. 1136. Sustained,

DANCIGER *v.* COOLEY, 248 U. S. 319 (1919)

Both the Wilson Act and the Webb-Kenyon Act were omitted from the Code as superseded by the National Prohibition Act, October 28, 1919, c. 85, 41 Stat. 305, but the Supreme Court held that the Webb-Kenyon Act had not been repealed by the Eighteenth Amendment nor by the National Prohibition Act:

MCCORMICK AND CO. *v.* BROWN, 286 U. S. 131 (1932)

The Webb-Kenyon Act and the "Reed Amendment" have been substantially re-enacted, March 22, 1933, c. 4, 48 Stat. 16.

Because of the Eighteenth Amendment, effective January 16, 1920, and repealed by ratification of the

Twenty-First Amendment, December 5, 1933, the decisions under the Webb-Kenyon Act are few in number. The first actual controversy under the Act involved a shipment of whiskey, intended for personal use of the consignee, who had ordered by mail and had no intention of disposing of it contrary to the law of the state, and delivered into a local option territory in which the sale alone was prohibited. In holding that the Webb-Kenyon Act had no application and that rights under the commerce clause were denied by a conviction on these facts, the Court advanced the solution of the case at bar not one bit. Such a holding, that the law of interstate commerce may be applicable to an interstate zone unaffected by state regulation does not preclude the effectiveness of that law when the state rule purports to affect the interstate zone. The case was,

> ADAMS EXPRESS CO. *v.* KENTUCKY, 238 U. S. 190 (1915).

Under the Webb-Kenyon Act, a state is empowered to require carriers to keep records of interstate shipments of liquor open for inspection to any officer or citizen:

> SEABOARD AIR LINE RY. *v.* N. CAROLINA, 245 U. S. 298 (1917).

And a state may limit the amount of liquor which any person, other than a common carrier, is permitted to bring into a state at one time, and then only under a permit especially issued for such interstate shipment, conspicuously affixed to each package, and required to be cancelled by the carrier, without which

it is made unlawful for the carrier knowingly to transport the same:

> RAINIER BREWING CO. *v.* GREAT N. PAC. SS. CO., 259 U. S. 150, 154 (1922).
>
> "* * * the purpose of the legislation was to make the transportation of intoxicating liquors in the State of Washington as difficult, conspicuous and expensive as possible. Only an individual could qualify to ship or receive it and it was intended that it should move only in a single package of strictly limited quantity, with a permit attached, etc. * * *"

and during national prohibition a state license fee imposed upon all manufacturers and wholesale dealers shipping medicinal and other alcoholic preparations into the state was upheld:

> MCCORMICK & CO. *v.* BROWN, 286 U. S. 131 (1932).

The Twenty-First Amendment. Up to this point, the immunities of intoxicating liquor in interstate commerce had been removed by the regulation of interstate commerce by Congress itself:

> IN RE RAHRER, 140 U. S. 545 (1891).
>
> CLARK DISTILLING CO. *v.* WESTERN MD. RY. CO., 242 U. S. 311 (1917).

Then, all that was sought to be remedied by the Webb-Kenyon Act was incorporated in the Constitution of the United States, Twenty-First Amendment thereto, providing in section 2 thereof:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This section was intended to guarantee by Constitutional sanction state powers for which the Congressional sanction had been sustained only by a divided Court. See report of Senator Blaine, from the Committee on the Judiciary, on Section 2 of original Senate Joint Resolution 211 and not of the Amendment.

> CONGRESSIONAL RECORD—SENATE, Vol. 76, pp. 4140-4144.

VI.

The Statute in Question was enacted in the Exercise of the Police Power of the State to Regulate and Restrain the Traffic in Malt and Brewed Beverages. All of its Provisions are Reasonable and Germane to the Subject Expressed in the Title and Essential to Properly Control said Traffic.

The cases cited in the appellant's brief, other than those involving intoxicating liquor, are not pertinent to the inquiry here, as the commodities there under consideration were fully protected by the commerce clause. Practically in the same class are the liquor cases decided prior to the enactment of the Webb-Kenyon Act, and the adoption of the Twenty-First Amendment, where the protection of interstate commerce had been removed from an interstate shipment of liquor only upon its arrival in the state to which consigned.

The appellant, on page 40 of its brief, concedes that the Webb-Kenyon Act prohibits the introduction into a state of intoxicating liquors in violation of the laws of the state, but argues that it is equally certain that a statute of a state is not to be accepted as the law of the state, if, in its passage, the legislature exceeded the limitations upon its power as expressed in the United States Constitution: Wherein has the Legislature of Pennsylvania exceeded its power? Is not the purpose of the Twenty-First Amendment the protection of the respective states in their effort to regulate and restrain the traffic in intoxicating liquor? It is conceded that the Twenty-First Amendment does not remove from intoxicating liquors the protection of interstate commerce, in the absence of any prohibitory legislation by a state, but when a state has acted and, under its police power, prohibits the transportation or importation of such liquors for delivery or use therein, except in accordance with the provisions of its liquor laws; then the Twenty-First Amendment also prohibits it.

The court below has so clearly stated this principle of law that we quote from its opinion (R-102):

> "As the law now is, the measure of control which the states may exercise is determined by the states themselves. If the importation of intoxicating liquor is acceptable to a state, it retains its status as the legitimate subject of interstate commerce, but if it is forbidden importation by the state, the laws of the United States likewise forbid it. Interstate commerce is spoken of under the figure of a stream whose free flow cannot be interrupted

> by any state law. Any state may however remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United States forbids its further importation if in violation of the laws of the state. Such is now the law and that the law was once otherwise goes for naught."

Surely it was not intended that the Twenty-First Amendment should apply only to so-called "dry states", as the language, used in said amendment, is clear and unambiguous. If there was any intention that its operation should be limited, it would have so stated. In the absence of any limitation, the said amendment must be construed to apply to all states, whether prohibiting entirely the traffic in intoxicating liquors or regulating and restraining such traffic.

There are but few decisions of the Courts subsequent to the adoption of the Twenty-First Amendment, in which that amendment has been considered. Some are relied upon by the appellant as sustaining its contention that the Pennsylvania Beverage License Law is unconstitutional. While we do not agree with the decisions in said cases, they are clearly distinguishable from the instant case. In JOSEPH TRINER CORPORATION *v.* ARUNDEL et al., 11 Fed. Sup. 145, 146, 147, a three-judge United States District Court, in an opinion filed June 29, 1935, held a statute of the State of Minnesota invalid, as being in violation of the equal protection clause, which prohibited the sale of liquor imported into the state in a finished condition unless the

brand of such liquor had been registered in the United States Patent Office, and which statute imposed no similar restriction with respect to liquor manufactured in that state.

The Court said, inter alia:

> "We are unable to see any justification for making a distinction between those who are permitted to manufacture or process liquor within the state and those who are permitted to import liquor into the state, with respect to the use of registered or unregistered brands. If the registration of brands of liquor in the Patent Office has, as is contended, some tendency to protect the public from misbranded liquor or to place responsibility for liquor sold within the state, there seems no logical reason for making the law apply only to those who import the finished product."

The Court also says:

> "The purpose of the provision (Twenty-First Amendment) referred to was to make it impossible for Congress to permit the transportation or importation into any state, territory, or possession of the United States of intoxicating liquors in violation of the laws of the state, territory, or possession. In other words, the provision left the states, territories, and possessions free to determine to what extent, if at all, intoxicating liquor should be a lawful subject of commerce within their limits."

Notwithstanding this statement of the purpose of the Constitutional Amendment, the Court finds that if the act discriminates against imported liquor, it is invalid, unless the discrimination is justified, because of some real and substantial difference having a reasonable relation to the subject of the particular legislation.

Is the Pennsylvania act subject to the same objection when it requires that all licensees be residents of the state for a period of two years, so that such licensees and its officers and directors may be amenable to its laws in the event of violation thereof? Or when it classifies licensees and exacts a larger license fee from the class that enjoys greater privileges, with respect to both domestic and imported beer?

Surely it is not, as the test of reasonableness, fixed by the Court in this and the following case, is fully met.

A similar case is that of YOUNG'S MARKET CO. *v.* STATE BOARD OF EQUALIZATION, 12 Fed. Sup. 140. There a three-judge United States District Court, in an opinion filed September 21, 1935, held a statute of the State of California invalid, as being in violation of the commerce and equal protection clauses of the Constitution, which required a person who engages in business as a "wholesaler" of beer manufactured in California to pay only a $50.00 license tax for each establishment maintained by him in said state for that purpose, but required a competing "wholesaler" of beer which he imports into said state to pay in addition to a like charge a further license tax of $500.00 for each

establishment maintained by him for the receipt and possession of such imported beer.

The Court adopted the interpretation placed upon the Twenty-First Amendment in the Minnesota case, supra, and quoted extensively from the decision filed therein.

It will be noted that in each of the foregoing cases, the complainants had fully complied with the laws of the respective states under which they secured the requisite licenses to engage in business. In the instant case, the complainant not only holds a void license to engage in business, but is and has been violating the interlocking business prohibition of the Pennsylvania law hereinbefore mentioned.

Another unreported case recently decided (February 28, 1936) by a three-judge United States District Court, (Western District, Southern Division) in the State of Washington, wherein the Twenty-First Amendment was considered, is that of PACIFIC FRUIT & PRODUCE COMPANY *v.* MARTIN et al. There a statute of the State of Washington required that out of state brewers and beer wholesalers, whose products are sold by licensees in the state, be themselves licensed. The Washington State Liquor Control Board threatened to revoke the license of complainant, who was licensed by said board, unless it ceased to handle foreign beer manufactured by a foreign brewery that refused to take out the state license required by the statute. The court held the particular provision of the act discriminated against foreign beer and violated both the

commerce clause and the Fourteenth Amendment. This decision cites with approval the case of YOUNG'S MARKET CO. *v.* STATE BOARD OF EQUALIZATION, supra, and states that if the decision of Pennsylvania District Court in the instant case is opposed to any of the conclusions reached by it, they nevertheless so hold. It is submitted that this case is not pertinent, as the Washington statute attempted to punish a resident licensee handling foreign beer because the non-resident manufacturer did not secure a license in the State of Washington.

On the other hand, in a recent case, GENERAL SALES AND LIQUOR COMPANY *v.* BECKER, et al., decided February 10, 1936, not yet reported, involving an interpretation of the Twenty-First Amendment, a three-judge United States District Court of Missouri, (Eastern District), held a statute of that state valid and not in violation of either the commerce or equal protection clauses of the Constitution of the United States, which required a non-resident wholesaler of intoxicating liquor to pay the same license fee as a resident wholesaler of Missouri, to wit, $500.00, in order to sell such liquor in said state, but prohibited such non-resident wholesaler from selling directly to a retail liquor dealer therein, although it permitted such sales by a resident wholesaler.

The court there reviews the decisions under the Webb-Kenyon Act, refers to the case of JOSEPH TRINER CORP. *v.* ARUNDEL, supra, and the Twenty-First Amendment, then says inter alia, under the heading "Equal Protection Clause of the Fourteenth Amendment":

"The equal protection clause does not prevent the State from making classifications of persons in the enactment of laws under the police power, but permits wide discretion in that regard, and avoids what is done only when it is without any reasonable basis, and purely arbitrary. Even in the absence of proof, if any state of facts can reasonably be conceived that would sustain the classification, the existence of that state of facts will be assumed. The burden is on the party who assails the classification to show that it is arbitrary."

The court also says in speaking of the classification of wholesalers under the act:

"To this end, and possibly for other reasons, the State has limited the sales of liquor made by non-residents to sales made to wholesale dealers in this State, or to retail dealers, when the transaction is made through such wholesale dealers. The wholesale dealer is by the Act made the agent of the non-resident whose transaction he handles.

"In this manner the State has undertaken to supervise and regulate the sale of liquor in this State by non-residents. If it is a fact, as it seems to be, that resident wholesalers enjoy privileges withheld from non-resident dealers, there is a perfectly obvious basis therefor. The classification made of dealers entitled to sell liquor to retailers in this State is a reasonable one, and not a mere arbitrary grouping of them, for the purpose of conferring some advantage to a particular class. The Missouri statute does not deny plaintiff any privilege granted it by the Equal Protection Clause."

The classification of distributor and importing distributor under the Pennsylvania Beverage License

Law is, for the reasons hereinbefore stated, both reasonable and bona fide, and not a mere arbitrary grouping in order to discriminate either against the importation of foreign beer or a non-resident dealer therein.

The most recent case, involving the Twenty-First Amendment, is PHILIP BLUM AND COMPANY, INC. et al. *v.* HENRY et al., decided by a three-judge United States District Court of Wisconsin (Eastern District) on March 28, 1936, upholding the constitutionality of a law of the State of Wisconsin dealing with the subject of intoxicating liquors which required a foreign corporation to secure a permit and to pay a permit fee of $500.00 per year and obtain a permit for each of its salesmen at $10.00 per year, but were not permitted to sell to retailers in Wisconsin, whereas a resident of Wisconsin, by paying a fee of $500.00 may also sell to retailers. The permit fee had been increased from $1.00 to $500.00.

The court in its opinion said, inter alia:

> "At the threshold of the application it is necessary to consider the interpretation and scope of the Twenty-First Amendment to the Constitution adopted concurrently with the repeal of the Eighteenth Amendment. It reads: 'Section 2. The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'
>
> "The essence of this amendment is prohibition—not of intoxicating liquors—but of (1) transportation or importation (2) into any state (3) for delivery, or (4) use therein of (5) intoxicating liquors, (6) in violation of the laws thereof—

i. e., any state. In other words, it deals solely with the subject of transportation or importation into any state and while the 18th Amendment comprehensively forbade manufacture, transportation and sale, and to that extent was a prohibition amendment, the Twenty-First Amendment is limited to a prohibition upon transportation or importation into any state, when such transportation or importation, being subjected to the test of the laws of a state, is in violation thereof. The latter is the condition upon which prohibition of transportation for delivery or use must be tested. Regardless of any views entertained respecting the Webb-Kenyon or the Wilson Acts which, prior to the Eighteenth Amendment, sought to deal with this subject matter, the Twenty-First Amendment by its very language, intended or intends to interdict, as we assume, transportation of any and all kinds, when intoxicating liquor is the subject thereof, in defiance of state interdiction. * * *

"The query is at once prompted, can it be possible that the language of the amendment may be so ignored that Congress may still regulate interstate commerce in intoxicating liquor, by authorizing transportation into any state, notwithstanding interdiction by the State? Or that it must be held, notwithstanding the amendment, that the right to transport intoxicating liquors into any state is guaranteed by other articles of the national Constitution as a 'privilege or immunity' of a citizen of the United States; or to 'citizens of the several states: or' is a guaranteed protection of equal laws? We regard these contentions as repugnant to the plain words of the articles. * * *

"If the amendment be interpreted to reserve to the national government full power of review or

surveillance over the states in the exercise of their powers, the plain intent respecting state power, must fail. * * *

"We are also of opinion that the criticism of the laws in question respecting their revenue rather than a police regulatory aspect, does not bear relevantly upon the right or scope, or character of classification. The accomplishment of either objective may necessitate what, within the terms of the amendment, are declared to be violations in respect of transportation or importation."

Both the reasoning and the decision of court in the preceding case, are in accord with that of the lower court in the instant case. However, if this Court should find that the lower court's interpretation of the Twenty-First Amendment is too broad, and that the provisions of a state statute must be reasonable and not discriminatory against foreign beer, then we submit that the Pennsylvania Beverage License Law fully meets such requirements.

VII.

Effect of Severability Clause of the Statute.

Appellant argues (Appellant's Brief, pages 58-59) that if this court should find its contention that the provisions relating to importing distributors are not constitutional, then the entire act which is a regulatory act on the entire traffic in malt or brewed beverages, must fall. This in spite of the severability clause in the act. It cites as authority for its contention (Appellant's Brief, pages 57-58) Railroad Re-

tirement Board *v.* Alton Railway Company 295 U. S. 330 (361).

We cannot see that the citation is in point, particularly in view of the concluding portion of the citation which is as follows:

> "In this view we are confirmed by the petitioners argument that as to some of the features which we hold unenforceable, it is 'unthinkable' and 'impossible' that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them."

Appellee in this case not only does not concede but definitely denies that the dominant purpose of the act in question was to regulate only the distribution of malt or brewed beverages by the classes of licensees designated as importing distributors or distributors. On the contrary, appellee contends that the dominant purpose of the act is to regulate and restrain the traffic in malt, brewed and vinous and fruit juice beverages. The classification of licenses is merely an incident of the main purpose, regulation and restraint.

Section 4 of the said Act (R. 45) is as follows:

> "Sales not for consumption on the Premises.—It shall be unlawful for any person to sell to another, except as herein otherwise provided in the case of retail dispensers or as may be otherwise authorized by law, any malt or brewed beverages not for consumption upon the premises where sold, unless such person holds a valid license issued under this act permitting such sale."

No place in this entire proceeding has appellant attacked the foregoing section of the Act in controversy, except as the portion of its argument (Appellant's Brief, page 59) referred to above, might be so construed.

The entire act, as has been stated, is intended to regulate and restrict, and since the licensing features of the act are in themselves severable it is unthinkable that it should be contended that because one minor feature of an act dealing with a paramount right of a state, should be invalid, the citizens of that state should be subjected to the evils of an unfettered and uncontrolled debauching of its people by vendors of an article as to which the state has pointedly stated its purpose to regulate and restrict.

Appellant also loses sight of the fact that the act which it attacks is but an amendment to the very act under which it asserts its right to contest the validity of the instant act. We urge that it is academic that the beneficiary of an act of assembly cannot be heard to contest its validity. If the instant act should be found to be invalid, in part, the act which it amends would be reinstated as substantive law.

The original act of the Commonwealth of Pennsylvania, amended by the act in controversy, is not under attack in this proceeding. Under that said original act (Act of May 3, 1933, P. L. 252, as amended) appellant herein could not qualify as a licensee, by reason of the non-residence of its officers and directors.

CONCLUSION

(1) The creation of two classes of distributors is a reasonable classification under the police power.

(2) The classification of the two types of distributor is based upon a substantial difference in privilege.

(3) The description of the two classes of distributors in Appellant's Brief, page 31, is appellant's conception of the act and not the definition of the act.

(4) The whole act is a reasonable exercise of the right of the Commonwealth of Pennsylvania to regulate and restrict the traffic in malt or brewed beverages.

(5) The Twenty-First Amendment removes from intoxicants the protection afforded other articles of commerce in interstate commerce.

Respectfully submitted,

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